PETRODAR OPERATING CO LTD

v.

NAM FATT CORPORATION BHD & ANOR

FEDERAL COURT, PUTRAJAYA
RAUS SHARIF PCA
ZULKEFLI MAKINUDIN CJ (MALAYA)
HASHIM YUSOFF FCJ
ZAINUN ALI FCJ
JEFFREY TAN FCJ
[CIVIL APPEALS NO: 02(i)-64-09-2012 & 02(i)-65-09-2012]
17 OCTOBER 2013

CIVIL PROCEDURE: *Jurisdiction - Forum conveniens - Contract - Foreign party - Performance bond - Performance bond called by foreign party - Writ action and applications for injunction - Whether Malaysian Court had jurisdiction to try action - Whether could have jurisdiction statutorily over foreign defendant - Whether jurisdiction implicit in power to grant leave for service out of jurisdiction - American Express Bank Ltd v. Mohamad Toufic Al-Ozeir & Anor and R Rama Chandran v. Industrial Court of Malaysia - Whether inconsistent with each other - Rules of High Court 1980, O. 11 r. 1 - Courts of Judicature Act 1964, s. 23*

CIVIL PROCEDURE: *Jurisdiction - Forum conveniens - Contract - Foreign party - Performance bond - Performance bond called by foreign party - Writ action and applications for injunction - Whether Malaysian Court had jurisdiction to try action - Whether Malaysia forum conveniens - Clause in Agreement stipulating contract and performance bond governed by Law of Sudan - Effect - Whether could not simpliciter preclude Malaysian Court from exercising discretion whether to hear suit or not - Rules of High Court 1980, O. 11 r. 1 - Courts of Judicature Act 1964, s. 23*

CIVIL PROCEDURE: *Injunction - Ad interim injunction - Setting aside - Balance of convenience, issue of - Whether should be canvassed at inter partes stage - Argument on balance of convenience - Whether could be split into subject matter of separate interlocutory application to set aside ad interim injunction - Whether splitting of argument inappropriate - Whether would result in multiplicity of proceedings and waste of time and costs*

A ***STATUTORY INTERPRETATION:*** *Construction of statutes - Rules of High Court 1980 - Order 11 r. 1 - Extraterritorial jurisdiction of Malaysian Courts - Whether conferring Malaysian Courts with jurisdiction over foreign defendant - Whether standing independently on its own - Whether predicated upon s. 23 Courts of Judicature Act 1964*

B

The second plaintiff in this case is a subsidiary of the first plaintiff, while the first defendant is an off-shore company based in Sudan and owner of a certain project in that country ('the project'). By a joint venture company formed between the second plaintiff and
C the first defendant, the plaintiffs undertook to construct the project for the first defendant, and to that end had provided a performance bond ('guarantee') in the sum of USD18 million in favour of the latter. It was not in dispute that the guarantee was issued by CIMB Bank (L) Ltd, the second defendant in the trial
D below, and that both the contract and the guarantee were governed by the law of Sudan.

The plaintiffs had substantially completed the project when disputes arose as to certain claims which the plaintiffs had submitted to the first defendant. The parties thereupon proceeded
E to negotiate for a settlement but, while negotiations were pending, the first defendant made a call on the guarantee. The plaintiffs viewed the call as fraudulent and unconscionable, and in the event filed a writ and statement of claim against the first and second defendants respectively. Further, the plaintiffs applied for
F and obtained an *ex parte ad interim* injunction restraining the defendants from enforcing the guarantee, an injunction restraining the first defendant from making a call on the guarantee, leave to serve the writ and the relevant order out of jurisdiction and an *ad-interim* order to preserve the *status quo* until the disposal of the
G *inter partes* hearing. The first defendant averred that the Malaysian Court had no jurisdiction to entertain plaintiffs' claim, and was not the *forum conveniens* for the action, and so, having entered conditional appearance, applied to set aside the concurrent writ of summons, the notice of concurrent writ to be served out of
H jurisdiction and the leave order to serve out of jurisdiction. The first defendant also had, *vide* a separate action, applied to set aside the *ad interim* injunction.

I

The High Court dismissed both applications of the first defendant, save that a stay of proceeding was granted pending reference of the dispute to arbitration. On appeal, the Court of Appeal affirmed the dismissal, and ruled that the High Court was correct in holding that: (i) it had jurisdiction to hear the plaintiffs' claim; (ii) the Malaysian Court could have jurisdiction statutorily over a foreign defendant under O. 11 r. 1 Rules of High Court 1980 ('RHC'), as jurisdiction is implicit in the power to grant leave for service out of jurisdiction and since the plaintiffs' case of fraudulent demand was cast as a tort committed within the jurisdiction; (iii) Malaysia was the appropriate forum to try the action and it would be unjust to compel the plaintiffs to sue in Sudan; and (iv) there was no justification to reverse the *ad interim* injunction pending the *inter partes* hearing. The first defendant sought to appeal further and, upon being granted leave there for, posed the following questions of law to the Federal Court, namely: (i) whether O. 11 RHC by itself conferred jurisdiction or was predicated upon s. 23 of the Courts of Judicature Act 1964 ('CJA') (given the apparent inconsistencies between the Federal Court judgments in *American Express Bank Ltd v Mohamad Toufic Al-Ozeir & Anor* and *R Rama Chandran v. Industrial Court of Malaysia*); (ii) whether the balance of convenience test is applicable to performance bond injunctions at an *inter partes* stage or this can be decided at the earliest possible stage; and (iii) whether the High Court, upon staying the suit subject to an arbitration agreement and parties having pursued arbitration proceedings, retains jurisdiction to hear the injunction application on an *inter partes* basis.

Held (dismissing appeals)
Per Raus Sharif PCA delivering the judgment of the court:

(1) The question of law posed in the first appeal is twofold in that this court is asked to answer, firstly, whether O. 11 r. 1 of RHC confers jurisdiction or is predicated upon s. 23 of CJA given the supposed inconsistencies between *American Express* and *Rama Chandran*, and secondly, whether there is indeed inconsistencies between the said two apex court decisions. (para 11)

(2) The first defendant's submission that O. 11 cannot on its own confer jurisdiction by virtue of the decision in *Rama Chandran* is misconceived. The Supreme Court in *Malayan Banking Bhd*

v. The International Tin Council & Anor, in considering whether s. 23 of the CJA confers extra-territorial jurisdiction, acknowledged the fact that O. 11 of the RHC does confer jurisdiction. The same sentiment was expressed by the Court of Appeal in *MatchPlan (Malaysia) Sdn Bhd & Anor v. William D Sinrich & Anor* when setting out how O. 11 of the RHC and s. 23 of the CJA ought to be construed. Premised on these two decisions, O. 11 of the RHC does not only confer jurisdiction but stands independently on its own and is not predicated upon s. 23 of the CJA. (paras 12, 13 & 14)

(3) The case of *American Express* dealt with the ramifications and the principles governing the operation of O. 11 RHC and sought primarily to answer the questions of whether on the facts of the case the High Court in Malaysia had jurisdiction to hear the action, and was or was not the *forum conveniens*. It was therein *inter alia* held that a Malaysian Court has the jurisdiction over a foreign defendant at common law if he is residing in Malaysia or submits to the jurisdiction if not so present, and that if he is present here and has not submitted to the jurisdiction, the Malaysian Court can assume such jurisdiction statutorily under O. 11 r. 1 of the RHC, as jurisdiction is implicit in the power to grant leave by the High Court for service out of jurisdiction. The case of *Rama Chandran,* on the other hand, dealt with different issues not akin to issues pertaining to jurisdiction (*ie*, dismissal of an employee), and the issue was whether the Federal Court therein had jurisdiction to grant Rama compensation for loss of employment without the necessity of remitting the case to the Industrial Court. *Rama Chandran* hence must be read in the particular context of the facts of the case and clearly it has nothing to do with the jurisdiction of Malaysian Court over foreign defendant. (paras 15-19)

(4) More, the decision in *Rama Chandran* centred on the construction of s. 25(2) CJA and the powers of the court under O. 53 RHC and does not in any way affect the then Supreme Court's decision in *American Express*. Consequently, the decision in *American Express* is still valid and there is no reason to depart from it. It follows that the Court of Appeal is correct in finding that in the context of O. 11 r. 1 of the RHC, jurisdiction referred to jurisdiction over a foreign

defendant and not jurisdiction over the claim. It follows further that the High Court was not wrong in stating that Malaysian Court could have jurisdiction statutorily over a foreign defendant under O. 11 r. 1 of the RHC as jurisdiction was implicit in its power to grant leave for service out of jurisdiction. (paras 19 & 20)

(5) This is a proper case for service out of jurisdiction. The present action brought by the plaintiffs falls within O. 11 r. 1(1)(iii)(i) RHC as the action is begun by writ seeking an injunction to refrain the first defendant from receiving the money demanded in respect of the guarantee. Further, the plaintiffs' reliance on O. 11 r. 1(1)(iii)(i) is proper as the said Order permits the service of a writ out of jurisdiction if the action begun by writ is founded on a tort committed within the jurisdiction. Hence, the Malaysian Courts have jurisdiction over the foreign defendant in this case. (para 20)

(6) In *American Express*, there was an express clause in the Agreement therein that parties chose Singapore Courts for litigation. Bearing in mind what was said by His Lordship Peh Swee Chin in that case in respect of such clause, it can be safely concluded, in the present case, that notwithstanding the presence of such a clause, the Malaysian Court, *ie*, the High Court below, could not be precluded simpliciter thereby from exercising the discretion, according to the doctrine of *forum non conveniens*, as to whether to hear the instant case or not. (paras 22 & 23)

(7) The High Court and the Court of Appeal, being guided by the principles enunciated in *American Express*, had rightfully embarked upon sound reasoning to ascertain which is the natural forum for trying this case. The hard facts of this case showed that the performance guarantee was issued in Kuala Lumpur by a Malaysian Bank having a place of business in Kuala Lumpur. The guarantee money sought to be restrained by an injunction was at all material times in Malaysia. The demand for the said guarantee money was made in Malaysia. There were various orders made against and in favour of parties by the court having competent jurisdiction within Malaysia. More importantly, the first defendant and second defendant's agreement to submit to the jurisdiction of the

Sudan Courts, as provided by cl. 8 of the Guarantee, was non-exclusive. Further, both the High Court and the Court of Appeal had deliberated on issues pertaining to logistics, costs of proceedings, political climate and geographical constraints in having this matter litigated in Sudan with which we have no reasons to disagree. Thus, the appropriate forum to litigate this action is Malaysia. (paras 24 & 25)

(8) It is the standard practice of our courts that after the grant of the *ad interim* injunction (pending *inter partes* hearing) to move on to the hearing of the *inter partes* injunction. Parties will then ventilate all issues and their respective contentions in the *inter partes* hearing itself. It is in the interest of smooth and expeditious administration of justice that parties should expeditiously move forward to the hearing of the *inter partes* injunction on the merits. It follows that it is not desirable to split the subject matter of a separate interlocutory application to set aside an *ad interim* injunction concurrently with the opposition to the *inter partes* injunction just on the issue of balance of convenience. It would only result in multiplicity of proceedings and wastage of time and costs. It is more desirable and appropriate that the question of balance of convenience be argued and decided at the *inter partes* stage of hearing of the injunction. Thus, the learned Judicial Commissioner did not err in his findings on this point. In any case, the balance of convenience question is already academic as the *ad interim* injunction herein was already discharged by the High Court after it heard the *inter partes* application for injunction. (paras 27 & 28)

(9) The last question posed in the second appeal needs no in-depth consideration. Based on what had transpired in this case, there is no necessity to answer this second question. (para 31)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif kedua dalam kes ini adalah anak syarikat plaintif pertama, sementara defendan pertama adalah sebuah syarikat pesisir pantai di Sudan dan pemilik kepada suatu projek di sana ('projek'). Melalui sebuah syarikat usahasama yang ditubuhkan oleh plaintif kedua dan defendan pertama, plaintif-plaintif bersetuju untuk membangunkan projek untuk defendan pertama, dan untuk itu telah menyediakan bon pelaksanaan bernilai USD18 juta ('gerenti') untuk manfaat defendan pertama. Tidak dinafikan bahawa gerenti

dikeluarkan oleh CIMB Bank (L) Ltd, defendan kedua di perbicaraan di bawah, dan bahawa kedua-dua kontrak dan gerenti adalah tertakluk kepada undang-undang Sudan. A

Plaintif-plaintif telah menyiapkan sebahagian besar projek bilamana pertikaian berbangkit mengenai beberapa tuntutan bayaran yang dibuat oleh plaintif-plaintif kepada defendan pertama. Berikutnya pihak-pihak telah berunding bagi mencari jalan penyelesaian, namun, semasa perundingan masih berjalan, defendan pertama telah membuat tuntutan terhadap gerenti. Plaintif-plaintif menganggap tuntutan yang dibuat oleh defendan pertama sebagai penipuan dan tidak berperikemanusiaan, dan berikutnya telah memfailkan writ dan pernyataan tuntutan masing-masing terhadap defendan pertama dan defendan kedua. Selain itu, plaintif-plaintif juga telah memohon dan memperoleh injunksi *ex parte ad interim* bagi menghalang defendan-defendan dari melaksanakan gerenti, injunksi bagi menghalang defendan pertama dari menuntut gerenti, kebenaran untuk menyampaikan writ dan perintah relevan di luar bidangkuasa terhadap defendan pertama dan perintah injunksi *ad interim* bagi mengekalkan *status quo* sementara menunggu selesainya pendengaran *inter partes*. Defendan pertama berhujah bahawa Mahkamah Malaysia tiada bidangkuasa untuk melayan tuntutan plaintif-plaintif, dan walau apapun, bukanlah *forum conveniens* bagi tuntutan tersebut, dan dengan itu, setelah memasukkan kehadiran bersyarat, memohon untuk mengenepikan kedua-dua writ saman, kedua-dua notis penyampaian writ di luar bidangkuasa serta perintah kebenaran penyampaian di luar bidangkuasa. Melalui suatu tindakan berasingan, defendan pertama juga memohon untuk mengenepikan injunksi *ad interim*. B C D E F

Mahkamah Tinggi menolak kedua-dua permohonan defendan pertama, tetapi membenarkan penggantungan prosiding sementara menunggu rujukan pertikaian kepada timbangtara. Di rayuan, Mahkamah Rayuan mengesahkan penolakan sekaligus memutuskan bahawa Mahkamah Tinggi betul bilamana mendapati: (i) ia mempunyai bidangkuasa untuk mendengar tuntuan plaintif-plaintif; (ii) Mahkamah Malaysia boleh mendapat bidangkuasa melalui statut terhadap seorang defendan asing di bawah A. 11 k. 1 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') kerana bidangkuasa adalah terserlah di dalam kuasa mahkamah untuk memberi kebenaran penyampaian di luar bidangkuasa, dan kerana tuntutan plaintif-plaintif yang mendakwa penipuan adalah berbentuk tort yang dilakukan dalam bidangkuasa; (iii) Malaysia adalah *forum* G H I

conveniens bagi mendengar kes dan adalah tidak adil untuk mengarahkan plaintif-plaintif untuk memfailkan kesnya di Sudan; dan (iv) tiada justifikasi untuk mengakas injunksi *ad interim* sementara menunggu pendengaran *inter partes*. Defendan pertama memohon untuk merayu dan, setelah mendapat kebenaran, telah mengemukakan persoalan undang-undang berikut ke Mahkamah Persekutuan, iaitu: (i) sama ada A. 11 k. 1 KMT memberi bidangkuasa atau terikat kepada s. 23 Akta Mahkamah Kehakiman 1964 ('AMK') (memandangkan ketidakkonsistenan yang kelihatan wujud dalam dua keputusan Mahkamah Persekutuan, iaitu *American Express Bank Ltd v. Mohamad Toufic Al-Ozeir & Anor* dan *R Rama Chandran v. Industrial Court of Malaysia)*; (ii) sama ada ujian imbangan keselesaan terpakai kepada injunksi bon pelaksanaan di peringkat *inter partes* atau ia boleh diputuskan di peringkat paling awal; dan (iii) sama ada Mahkamah Tinggi, setelah menggantung tindakan atas persetujuan timbangtara dan pihak-pihak kemudian memulakan prosiding timbangtara, masih mengekalkan bidangkuasa untuk mendengar permohonan injunksi secara *inter partes*.

Diputuskan (menolak rayuan)
Oleh Raus Sharif PMR menyampaikan penghakiman mahkamah:

(1) Persoalan undang-undang yang dikemukakan di dalam rayuan pertama mempunyai dua cabang dalam ertikata mahkamah ini diminta menjawab, pertama, sama ada A. 11 k.1 KMT memberi bidangkuasa atau terikat dengan s. 23 AMK mengambilkira ketidakkonsistenan yang dikatakan wujud dalam *American Express* dan *Rama Chandran*, dan kedua, sama ada ketidakkonsistenan benar-benar wujud dalam kedua-dua kes mahkamah tertinggi tersebut.

(2) Hujah defendan pertama bahawa A. 11 tidak dengan sendirinya memberi bidangkuasa berdasarkan keputusan di dalam *Rama Chandran* adalah tersasul. Mahkamah Agong di dalam *Malayan Banking Bhd v. The International Tin Council & Anor*, dalam menimbang sama ada s. 23 AMK memberi bidangkuasa extraterritorial, mengakui fakta bahawa A. 11 KMT sememangnya memberikan bidangkuasa sedemikian. Sentimen sama juga diluahkan oleh Mahkamah Rayuan dalam kes *MatchPlan (Malaysia) Sdn Bhd & Anor v. William D Sinrich & Anor* semasa menerangkan bagaimana A. 11 KMT dan

s. 23 AMK harus ditafsirkan. Berdasarkan kepada kedua kes ini, A. 11 bukan sahaja memberi bidangkuasa tetapi berdiri bersendirian dengan bebas tanpa terikat kepada s. 23 AMK.

(3) Kes *American Express* menangani soal ramifikasi dan prinsip yang mengawalselia pemakaian A. 11 KMT dan secara pentingnya cuba menjawab persoalan sama ada berdasarkan fakta kes Mahkamah Tinggi di Malaysia berbidangkuasa untuk mendengar tindakan, dan merupakan *forum conveniens* atau tidak. Diputuskan di situ antara lain bahawa Mahkamah Malaysia mempunyai bidangkuasa terhadap seorang defendan asing di sisi common law jika beliau tinggal di Malaysia atau tunduk kepada bidangkuasa jika tidak tinggal di Malaysia, dan bahawa jika ia tinggal di sini dan tidak tunduk kepada bidangkuasa, maka Mahkamah Malaysia boleh mendapat bidangkuasa melalui statut di bawah A. 11 k. 1 KMT, kerana bidangkuasa adalah terserlah di dalam kuasa Mahkamah Tinggi untuk memberi kebenaran penyampaian di luar bidangkuasa. Kes *Rama Chandran*, sebaliknya, berurusan dengan isu-isu berbeza yang sama sekali berlainan dengan isu-isu berkaitan bidangkuasa (iaitu pembuangan kerja seorang pekerja), dan isunya adalah sama ada Mahkamah Persekutuan dalam kes itu mempunyai bidangkuasa untuk memberikan pampasan kepada Rama kerana kehilangan pekerjaan tanpa perlu menghantar balik kes ke Mahkamah Perusahaan. *Rama Chandran* dengan itu harus dibaca dalam konteks tertentu fakta kes tersebut. Apa yang jelas ialah kes tersebut tidak ada kena mengena dengan bidangkuasa Mahkamah Malaysia ke atas seorang defendan asing.

(4) Selanjutnya, keputusan di dalam *Rama Chandran* berkisar kepada pentafsiran s. 25(2) AMK dan kuasa-kuasa mahkamah di bawah A. 53 KMT dan sama sekali tidak menjejaskan keputusan Mahkamah Agong di dalam *American Express*. Oleh itu, keputusan di dalam *American Express* masih sah dan tiada apa-apa alasan untuk menyimpang darinya. Ianya mengikut bahawa Mahkamah Rayuan betul apabila mendapati bahawa dalam konteks A. 11 k. 1 KMT, bidangkuasa adalah merujuk kepada bidangkuasa terhadap defendan asing dan bukannya ke atas tuntutan. Mahkamah Tinggi dengan itu tidaklah khilaf apabila menyatakan bahawa Mahkamah Malaysia boleh mendapat bidangkuasa terhadap defendan asing melalui statut

di bawah A. 11 k. 1 KMT kerana bidangkuasa adalah terserlah di dalam kuasanya untuk memberi kebenaran penyampaian di luar bidangkuasa.

(5) Ini adalah kes yang sesuai untuk penyampaian di luar bidangkuasa. Kes semasa yang dibawa oleh plaintiff adalah terangkum di bawah A. 11 r. 1(1)(iii)(i) KMT kerana tindakan dimulai dengan writ bagi mendapatkan injunksi bagi menghalang defendan pertama dari menerima wang yang dituntut berhubung dengan gerenti. Kebergantungan plaintif ke atas A. 11 r. 1(1)(iii)(i) KMT juga adalah teratur kerana Aturan tersebut membenarkan penyampaian di luar bidangkuasa jika tindakan yang dimulai dengan writ adalah berasaskan tort yang dilakukan di dalam bidangkuasa. Mahkamah Malaysia, dengan itu, mempunyai bidangkuasa terhadap defendan asing dalam kes di sini.

(6) Di dalam *American Express*, terdapat satu fasal express di dalam Perjanjian di situ bahawa pihak-pihak memilih Mahkamah Singapura untuk tindakan guaman. Mengambilkira apa yang dikatakan oleh Yang Arif Peh Swee Chin di dalam kes itu berhubung fasal tersebut, ianya boleh disimpulkan dengan selamat bahawa walaupun fasal sedemikian wujud, Mahkamah Malaysia, iaitu Mahkamah Tinggi di bawah, tidak boleh simpliciter disisihkan dari melaksanakan budibicaranya, berdasarkan doktrin *forum non conveniens*, sama ada untuk mendengar kes semasa ataupun tidak.

(7) Mahkamah Tinggi dan Mahkamah Rayuan, dengan berpandukan prinsip-prinsip seperti yang disebut di dalam *American Express*, telah dengan betulnya dan berdasarkan alasan-alasan yang kukuh cuba menentukan di manakah forum semulajadi bagi mendengar kes. Fakta jelas kes ini menunjukkan bahawa gerenti pelaksanaan telah dikeluarkan di Kuala Lumpur oleh sebuah Bank Malaysia yang berniaga di Kuala Lumpur. Wang gerenti yang hendak dihalang melalui injunksi pada semua waktu material adalah berada di Malaysia, dan tuntutan bagi wang tersebut dibuat di Malaysia. Terdapat beberapa perintah yang dibuat sama ada terhadap atau untuk pihak-pihak oleh mahkamah yang mempunyai bidangkuasa kompeten di Malaysia. Lebih penting, persetujuan defendan pertama dan kedua untuk tunduk kepada bidangkuasa Mahkamah Sudan

adalah tidak eksklusif. Selain itu, kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan telah menangani isu-isu mengenai logistik, kos prosiding, suasana politik dan sekatan-sekatan geografi jika perkara ini dibicarakan di Sudan, dan kami tiada alasan untuk tidak bersetuju dengan mereka. Ianya mengikut bahawa forum yang sesuai bagi membicarakan kes ini adalah Malaysia.

(8) Sudah menjadi amalan biasa mahkamah-mahkamah kita bahawa selepas membenarkan injunksi *ad interim* (sementara menunggu pendengaran *inter partes*) untuk terus sahaja mendengar injunksi *inter partes*. Pihak-pihak kemudian mengemukakan dan berhujah atas semua isu di pendengaran *inter partes*. Adalah sesuatu yang akan melicinkan pentadbiran keadilan jika pihak-pihak terus berhujah semasa pendengaran *inter partes* atas merit. Ianya mengikut bahawa mengasingkan halperkara suatu permohonan interlokutori yang berasingan untuk mengenepikan suatu injunksi *ad interim* secara bersama dengan bantahan kepada injunksi *inter partes* cuma atas isu imbangan keselesaan adalah sesuatu yang tidak diperlukan. Ia hanya akan menyebabkan pertindihan prosiding dan membuang masa serta kos. Adalah lebih wajar dan bermanfaat bahawa persoalan imbangan keselesaan dihujah dan diputuskan di peringkat pendengaran injunksi *inter partes*. Maka yang arif Pesuruhjaya Kehakiman tidak khilaf dalam dapatannya atas persoalan ini. Apapun, persoalan imbangan keselesaan sudah menjadi akademik memandangkan injunksi *ad interim* di sini sudah pun dibatalkan oleh Mahkamah Tinggi selepas mendengar permohonan injunksi *inter partes*.

(9) Soalan terakhir di dalam rayuan kedua tidak memerlukan pertimbangan mendalam. Berdasarkan apa yang berlaku di dalam kes ini, tiada keperluan untuk menjawab persoalan kedua tersebut.

Case(s) referred to:

American Express Bank Ltd v. Mohamad Toufic Al-Ozeir & Anor [1995] 1 CLJ 273 SC ***(foll)***

Diamond v. Bank of London & Montreal [1979] 1 QB 333 ***(refd)***

Matchplan (Malaysia) Sdn & Anor v. William D Sinrich & Anor [2004] 1 CLJ 810 CA ***(foll)***

Malayan Banking Bhd v. The International Tin Council & Anor & Another Case [1989] 2 CLJ 961; [1989] 1 CLJ (Rep) 87 SC ***(foll)***

Nam Fatt Corporation Bhd & Anor v. Petrodar Operating Co Ltd & Anor [2010] 9 CLJ 732 HC ***(refd)***

Petrodar Operating Co Ltd v. Nam Fatt Corporation Bhd & Anor [2012] 8 CLJ 311 CA ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

RIH Services (M) Sdn Bhd v. Tanjung Tuan Hotel Sdn Bhd [2002] 3 CLJ 83 CA ***(aff)***

Legislation referred to:

Companies Act 1965, s. 176

Courts of Judicature Act 1964, ss. 23, 25(2)

Rules of the High Court 1980, O. 11 r. 1(1)(iii)(h), (i), O. 53

For the appellant - Kamraj Nayagam (Shannon Rajan & Janice Tay with him); M/s Skrine

For the respondents - GH Tee; M/s GH Tee & Co

[Editor's note: For the Court of Appeal judgment, please see Petrodar Operating Co Ltd v. Nam Fatt Corporation Bhd & Anor [2012] 8 CLJ 311.]

Reported by Wan Sharif Ahmad

JUDGMENT

Raus Sharif PCA:

Introduction

[1] There are two appeals before us: Civil Appeal No: 02(i)-64-09-2012 ("first appeal") and Civil Appeal No: 02(i)-65-09-2012 ("second appeal"). Both appeals arose out of the High Court's decision on 30 June 2010, which was upheld unanimously by the Court of Appeal on 13 March 2012.

[2] The first appeal is an appeal by the appellant against the decision of Court of Appeal in affirming the High Court's decision in dismissing the appellant's application to set aside or alternatively discontinue the *ad interim* injunction granted on 3 May 2005 in relation to a performance guarantee. The second appeal is the appellant's appeal against the decision of the Court of Appeal in affirming the decision of the High Court in dismissing the appellant's application to set aside the concurrent writ of summons, notice of concurrent writ to be served outside jurisdiction, and the order granting leave to serve the notice of the concurrent writ, or alternatively for an order staying further proceedings on the ground that Malaysia is not the *forum non conveniens*.

[3] Leave to appeal was granted by this court on 6 August 2012 on the following questions of law.

First Appeal

Whether O. 11 of the Rules of the High Court 1980 confers jurisdiction or whether this is predicated on s. 23 of the Courts of Judicature Act 1964 (given the apparent inconsistencies between the Federal Court judgments in *American Express Bank Ltd v. Mohamad Toufic Al-Ozeir & Anor* [1995] 1 CLJ 273 and *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147.

Second Appeal

(a) Whether the balance of convenience test is applicable to performance bond injunctions at an *inter partes* stage or this can be decided at the earliest possible stage;

(b) Whether the High Court, upon staying the suit subject to an arbitration agreement and parties having pursued arbitration proceedings, retains jurisdiction to hear the injunction application on an *inter partes* basis.

[4] At the High Court, the appellant in both these appeals is the first defendant and the first and second respondents are the plaintiffs. The second defendant (CIMB) is the issuer of the performance guarantee and not a party relevant to these appeals. In our judgment, for ease of reference, parties will be referred to their respective capacities as in the High Court.

Background Facts

[5] The background facts have been laid down adequately in the grounds of judgment of the learned Judicial Commissioner (JC) reported in *Nam Fatt Corporation Bhd & Anor v. Petrodar Operating Co Ltd & Anor* [2010] 9 CLJ 732 and in the grounds of judgment of the Court of Appeal reported in *Petrodar Operating Co Ltd v. Nam Fatt Corporation Bhd & Anor* [2012] 8 CLJ 311. Thus, we do not propose to repeat them here except to state the salient facts which are essential in determining the issues raised in these appeals as follows:

(a) NF Energy Sdn Bhd ("second plaintiff") a subsidiary of Nam Fatt Corporation Bhd ("first plaintiff"), entered, through the vehicle of a joint venture company ("JV") into a contract with Petrodar Operation Co Ltd ("first defendant") an offshore company, to carry out construction works on a project in Sudan. As required under the contract, the second plaintiff provided a performance bond ("the guarantee") in favour of the first defendant, the owner of the project. The guarantee was issued by CIMB Bank (L) Limited ("CIMB") who is the second defendant. The parties agreed that the contract and the guarantee would be governed by the laws of Sudan.

(b) The project was substantially completed but dispute arose between the JV and the first defendant regarding claims for variation works done and charges to the JV's original works which the plaintiffs claim that the first defendant had refused to certify or pay. Parties then negotiated for a settlement but while the negotiation for settlement was going on, the first defendant attempted to make a call on the guarantee. Viewing the call as fraudulent and unconscionable, the plaintiffs quickly filed a writ and a statement of claim against the first and second defendants respectively. On 18 March 2010 the plaintiffs obtained an *ex parte ad interim* restraining order pursuant to s. 176 of the Companies Act 1965 from the Shah Alam High Court restraining the defendants by themselves or by their servants or agents from taking any action to enforce the guarantee or from taking any proceeding whatsoever or from appointing receivers and managers under the security except with leave of the court. On 13 April 2010 the plaintiffs obtained an *ex parte* injunction to restrain the first defendant from receiving the money under the guarantee or from making a call on and receiving any proceed under the guarantee pending *inter partes* hearing.

(c) The plaintiffs then obtained leave of court to serve out of jurisdiction the writ of summons as well as the injunction order and other related cause papers to the first defendant. In the meantime an *ad interim* order was made on 3 May 2010 to preserve the *status quo* until disposal of the *inter partes* hearing. Against this backdrop, the first defendant entered conditional appearance on 7 June 2010.

(d) On 16 June 2010 the first defendant applied *vide* encl. (35) to set aside the concurrent writ of summons, notice of concurrent writ to be served out of jurisdiction and the leave order dated 15 April 2010 to serve out of jurisdiction. Further thereto the first defendant also filed an application *vide* encl. (43) to set aside the *ad interim* injunction.

High Court

[6] The learned JC dismissed both the first defendant's application *vide* encls. (35) and (43) on 20 June 2010 save that a stay of proceeding was granted pending the reference of the dispute to arbitration. The stay granted was subject to the first defendant paying interest at the rate of 3% per annum of the guarantee sum of USD18 million every quarter by the 30th day of the commencement of each quarter to the first defendant's solicitors client's account. Given that the application to set aside the *ad interim* injunction was dismissed, the learned JC decided to proceed with *inter partes* hearing of the injunction. On 30 August 2010 the *inter partes* injunction was heard and dismissed by the learned JC. Flowing from this, the order pertaining to the payment of interest sum given on 20 June 2010 was also reversed.

[7] In coming to the above decision the High Court was of the view that:

(a) the first defendant had not submitted, succumbed nor surrendered to the jurisdiction of the court merely because they had objected to the *ad interim* injunction;

(b) the Malaysian court have jurisdiction over a foreign defendant under O. 11 r. 1 of the Rules of the High Court 1980 ('RHC') as jurisdiction is implicit in the power to grant leave for service out of jurisdiction;

(c) the plaintiffs' case of fraudulent demand was cast as a tort committed within the jurisdiction, and the Malaysian Court had jurisdiction under O. 11 r. 1(1)(iii)(h) of RHC;

(d) the Malaysian Court was the appropriate forum to try the action and it would be unjust to compel the plaintiffs to sue in Sudan. Although the law of contract was the law of Sudan, the decision on jurisdiction is quite different from the proper law of contract to be applied; and

(e) there was no material and valid ground adduced by the first defendant to justify the reversal of the *ad interim* injunction order.

[8] Aggrieved by the aforesaid findings, the first defendant lodged separate appeals to the Court of Appeal appealing against the orders made by the learned JC in relation to the two applications filed.

Court Of Appeal

[9] On 13 March 2012 the Court of Appeal dismissed both the first defendant's appeals with costs. In so doing the Court of Appeal held *inter alia* that:

(a) The High Court was correct in holding that it had jurisdiction to hear the plaintiffs' claim. This was because the first plaintiff was a public listed company in Malaysia and NF Energy Sdn Bhd was its subsidiary. And the guarantee was issued on the plaintiffs' request by CIMB (second defendant) which had a place of business in Kuala Lumpur. Further, the alleged fraudulent and/or unconscionable demand on the guarantee was made in Malaysia and the plaintiffs' claim premised on a fraudulent demand was a tort that was committed in Malaysia.

(b) In the context of O. 11 r. 1 of the RHC, jurisdiction referred to jurisdiction over foreign defendant and not jurisdiction over the claim. Thus, where the court after having decided it had jurisdiction over the subject matter found the foreign defendant could not be served in Malaysia because he was not present here and had not submitted to its jurisdiction (like the first defendant), in such circumstances the court is allowed to statutorily assume jurisdiction over the foreign defendant under O. 11 r. 1 of the RHC if it is satisfied that any of the limbs under that provision applied. Viewed in that context, the High Court was not wrong in stating that Malaysia could have jurisdiction statutorily over a foreign defendant under O. 11 r. 1 of the RHC as jurisdiction was implicit in the power to grant leave for service out of jurisdiction.

(c) The fact showed that although the instructions to make the demand on the guarantee originated from the first defendant, the purportedly fraudulent and/or unconscionable demand was made in Malaysia at CIMB's office in Malaysia. Both the

plaintiffs were in Malaysia. Accordingly, the evidence from witnesses on the issues of fact would be more readily available in Malaysia thereby making the trial in Malaysia more convenient.

(d) The High Court was not in error in exercising its discretion not to set aside the *ad interim* injunction pending the *inter partes* hearing. The facts before the court at the *ex parte* stage were that the first defendant had made calls on the guarantee despite parties being in negotiation for a settlement and despite the fact that the JV had acceded to the first defendant's request for the guarantee to be renewed pending the settlement negotiations. The plaintiffs had averred that the demand was made as a tool or means of oppression or vexation against them and that, in the circumstance, the demand was fraudulent, unconscionable and/or invalid under the law.

Findings

[10] Question of Law posed in the first appeal

Whether O. 11 Of The Rules Of The High Court 1980 Confers Jurisdiction Or Whether This Is Predicated On s. 23 Of The Courts Of Judicature Act 1964 (Given The Apparent Inconsistencies Between The Federal Court Judgments In American Express Bank Ltd v. Mohamad Toufic Al-Ozeir & Anor [1995] 1 CLJ 273 And R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147

[11] The way we perceive it, the question of law posed in this appeal is twofold, in that:

(a) Firstly, we will have to consider whether O. 11 of the RHC confers jurisdiction or whether this is predicated under s. 23 of the Courts of Judicature Act 1964 ('CJA') given the supposed inconsistencies between the abovementioned two apex court judgments concerning jurisdiction ie, the then Supreme Court case of *American Express Bank Ltd v. Mohamad Toufic Al-Ozeir & Anor* [1995] 1 CLJ 273 SC and the Federal Court case of *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147. Put simply, whether O. 11 RHC on its own confers jurisdiction or that it is predicated under s. 23 of the CJA; and

(b) Secondly, we will endeavour to determine whether there is indeed inconsistencies in the aforesaid two apex court decisions.

[12] In regard to the first part of the question of law posed, learned counsel for the first defendant submitted that although the case of *American Express* clearly states that O. 11 of the RHC confers jurisdiction, however, the case of *Rama Chandran* is the authority for the proposition that the Rules of the High Court 1980 on its own cannot confer statutory jurisdiction. We have anxiously deliberated on this issue and with respect we find that the first defendant's submission on this point is misconceived. The then Supreme Court case of *Malayan Banking Bhd v. The International Tin Council & Anor & Another Case* [1989] 2 CLJ 961; [1989] 1 CLJ (Rep) 87 in considering whether s. 23 of the CJA confers extra-territorial jurisdiction had clearly highlighted that O. 11 of the RHC is clothed with the same powers. His Lordship Mohd Azmi SCJ in delivering the judgment of the court held that:

> Apart from O 11 r. 1 of the Rules of the High Court 1980, s. 23(1)(b) of the Courts of Judicature Act 1964 provides extra-territorial jurisdiction to the High Court in cases where oversea foreigners are sued as co-defendants ...

[13] From the above quoted passage, it is clear that the then Supreme Court acknowledged the fact that O. 11 of the RHC does confer jurisdiction. His Lordship Gopal Sri Ram JCA (as he then was) in the case of *Matchplan (Malaysia) Sdn & Anor v. William D Sinrich & Anor* [2004] 1 CLJ 810 in referring to the then Supreme Court case of then *Malayan Banking Bhd* took pains to set out how O. 11 RHC and s. 23 of the CJA are to be construed. His Lordship has this to say:

> Once the court is seized of extra-territorial jurisdiction by virtue of s. 23(1) CJA, O. 11 r. 1 ceases to be of jurisdictional relevance. The decision in *Malayan Banking Berhad v. International Tin Council* make it plain that O. 11 r. 1 assumes jurisdictional importance only in cases falling outside the scope of s. 23(1). Accordingly, in cases where s. 23(1) applies, O. 11 r. 1 becomes a mere procedural formality to enable a plaintiff to effect service abroad. In the present case, if the plaintiffs are right in their argument on the facts, then this is a case that falls both under s. 23(1)(a) and (c) of the Courts of Judicature Act as well as under para. (h) of O. 11 r. 1 which empowers the court to grant

leave to a plaintiff to serve a writ out of jurisdiction "if the action begun by the writ is founded on a tort committed within the jurisdiction". So it does not really matter which of these provisions is relied upon to found jurisdiction in this case.

[14] We see no necessity to regurgitate what had been so admirably explained by His Lordship Gopal Sri Ram in the case of *Matchplan Malaysia*. As such, premised on the decision of *Malayan Banking Bhd* and *Matchplan Malaysia* we are of the considered view that O. 11 of the RHC does not only confers jurisdiction but that it stands independently on its own and is not predicated upon, s. 23 of the CJA 1964.

[15] Next we turn to the to the second part of the question of law posed ie, whether are there indeed any inconsistencies between the then Supreme Court decision of *American Express* and the Federal Court case of *Rama Chandran*. Foremost, the case of *American Express* dealt with the ramifications and the principles governing the operation of O. 11 RHC. In that case, the appellant ("the bank") was a foreign bank based in Singapore. Sometime in 1992, the bank entered into two agreements with Mohamed Toufic Al-Ozeir And Another ("the customers") who were residents in Malaysia, to assist the latter in some foreign exchange transactions. These agreements were executed in Singapore. Information and advice pertaining to the transactions were then passed by the bank to the customers in Kuala Lumpur and following that several foreign exchange transactions were executed in London, New York and Singapore. By the said agreements, both parties agreed to submit to the jurisdiction of Singapore court and be governed by the laws of Singapore. The customers suffered losses from the transaction. They filed a writ action in Kuala Lumpur High Court and claimed damages for fraudulent misrepresentation. Leave to issue and service of the notice of writ of summons out of jurisdiction on the bank was granted by the Deputy Registrar. On 24 December 1993, the bank applied to the High Court Judge to set aside the said leave and pleadings on the ground that the Malaysian court's lack of jurisdiction to try the case and the Singapore courts is of *forum non conveniens*.

[16] The learned High Court Judge dismissed the application and ruled on the authority of *Diamond v. Bank of London & Montreal* [1979] 1 QB 333, that the tort of fraudulent misrepresentation, when made by telephone or telex, was committed at the place where the message was received and acted on, and not at the place it was sent, and on that ground held that the tort in this

A case was committed in Malaysia, thus giving the Malaysian court jurisdiction to hear the case. According to the learned judge further, the fact that the tort was committed in Malaysia overrode all other considerations and the plea of *forum non conveniens* must also therefore fail. Aggrieved by the said decision the bank
B appealed to the then Supreme Court.

[17] Before the Supreme Court the primary issues that arose were: (i) whether on the facts the High Court in Malaysia had jurisdiction to hear the action; and (ii) whether in circumstances
C of that case the Malaysian High Court was or was not the *forum conveniens*. As for the first issue the Federal Court held that a Malaysian court has the jurisdiction over a foreign defendant at common law if the said defendant is residing in Malaysia or if he submits to jurisdiction if not so present. However, if he is present
D here and has not submitted to jurisdiction, the Malaysian court can assume such jurisdiction statutorily under O. 11 r. 1 of the RHC, as jurisdiction is implicit in the power to grant leave by the High Court for service out of jurisdiction. Further O. 11 r. 1(1)(iii)(h) of the RHC expressly provides for service out of
E jurisdiction "if the action begun by writ is founded on a tort committed within the jurisdiction". Thus, it was held that, although the bank was not present within jurisdiction and had not submitted to the jurisdiction of the Malaysian court, the facts remains that the statement of claim was cast in tort committed in
F Malaysia. The Malaysian court therefore had jurisdiction to entertain the customers' claim. Having found that the Malaysian court had the jurisdiction to hear this case the Supreme Court embarked upon the exercise to ascertain whether the Malaysian court was a suitable or more appropriate forum to adjudicate this
G claim. After due consideration the Supreme Court found that the customers had clearly failed to satisfy that the Malaysian court was the most appropriate forum to try the action. The Supreme Court found that the Singapore court is the more suitable forum to try this action. The facts showed that except for the fact that
H the alleged fraudulent and misleading information from the bank to the customers were received by the customers in Kuala Lumpur, all other transactions had taken place outside Malaysia. The relevant securities of the customers were also deposited with the bank in Singapore and London and not in Malaysia. The Supreme
I Court found that although both the customers were residents in Malaysia, the main protagonist from the bank's camp were residents outside Malaysia, either in London or Singapore. The Supreme Court took cognizance of the fact that there were no

peculiar difficulties which the customers would face apart from the inconvenience and expenses of adjudicating this action if it was heard in Singapore.

[18] The case of *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 (*Rama Chandaran*) on the other hand dealt with different issues not akin to issues pertaining to jurisdiction. It is a case involving dismissal of an employee where the Industrial Court held that the appellant ("Rama") was dismissed with just cause and excuse. Rama's application to the High Court to quash the decision of the Industrial Court was refused. However, his appeal to the Federal Court was allowed and the Industrial Court's award was accordingly quashed. The consequential issue that arose in that case was whether the Federal Court has the jurisdiction to grant Rama compensation for loss of employment, without the necessity of remitting the case to the Industrial Court with the discretion to make the necessary consequential orders. The Federal Court by majority held that it had the jurisdiction to do so in order to avoid injustice of further delay and expenses to Rama.

[19] In our considered view *Rama Chandran* must be read in the particular context of the facts in that case, and clearly it has nothing to do with the jurisdiction of Malaysian court over foreign defendant. As we have said earlier the issue before the Federal Court in *Rama Chandran* was whether the Federal Court had powers to remit the case back to Industrial Court for consequential relief and whether Federal Court or High Court may grant consequential relief. The pertinent point which was given due deliberation by the Federal Court in *Rama Chandran* was to the issue of jurisdiction of court ie, whether appellate or supervisory. It is in this context that the Federal Court endeavoured to discuss that the Rules of the Court is merely to regulate procedure ie, the machinery to exercise jurisdiction and do not extend into the area of substantive law which is the source of jurisdiction.

[20] It is important for us to highlight here that the decision of the Federal Court in *Rama Chandran* centered on the construction of s. 25(2) of the CJA and the powers of the court under O. 53 RHC. Thus, it is our view that the decision does not in any way affect the then Supreme Court's decision in *American Express*. Thus, we hold that the decision in *American Express* is still valid,

and we have no reason to depart from it. Further to the foregoing, we agree with the findings of the Court of Appeal that in the context of O. 11 r. 1 of the RHC, jurisdiction referred to jurisdiction over a foreign defendant and not jurisdiction over the claim. Thus, where the court after having decided it had jurisdiction over the subject matter found the foreign defendant could not be served in Malaysia because he was not present here and had not submitted to its jurisdiction (like the first defendant), in such circumstances the court is allowed to statutorily assume jurisdiction over the foreign defendant under O. 11 r. 1 of the RHC if it is satisfied that any of the limbs under that provision applied. Viewed in that context, the High Court was not wrong in stating Malaysia could have jurisdiction statutorily over a foreign defendant under O. 11 r. 1 of the RHC as jurisdiction was implicit in the power to grant leave for service out of jurisdiction. As for the issue of whether this is a proper case for service out of jurisdiction we are satisfied that the plaintiffs have successfully grounded their application within the confines of O. 11 r. 1(1)(iii)(i) of the RHC 1980. The present action brought by the plaintiffs falls within O. 11 r. 1(1)(iii)(i) of the RHC 1980 as the plaintiffs present action is begun by writ seeking an injunction to refrain the first defendant from doing anything within the jurisdiction, namely to refrain from receiving the money demanded in respect of the guarantee. Further, the plaintiffs' reliance on O. 11 r. 1(1)(iii)(h) is proper as the said order permits the service of a writ out of jurisdiction if the action begun by the writ is founded on a tort committed within the jurisdiction. Hence in our judgment for the reasons aforesaid we find that the Malaysian courts have jurisdiction over the foreign defendant as in this case. To this end we are also satisfied that the plaintiffs have successfully confined their application within salient provisions of O. 11 of the RHC to effect service out of jurisdiction.

[21] Next we move on to the issue of *forum non conveniens*. In discussing the issue of *forum non conveniens* one cannot escape from the reasoning's postulated in the case of *American Express*, wherein the then Supreme Court was of the view that *forum non conveniens* refers to the suitability or appropriateness and not convenience itself. The fundamental principle governing this maxim is that whether there is some other tribunal, having competent jurisdiction, in which the case can be tried more suitably for the interest of all parties to meet the ends of justice. A good guide for court in

deliberating on the issue of *forum non conveniens* was well set out in the foregoing passage of His Lordship Peh Swee Chin's judgment which is reproduced herein below as follows:

> In our view, where an application by a defendant for stay of proceedings is concerned, in applying the said doctrine, the defendant would have to satisfy the Court that "some other forum is more appropriate" per Lord Templeman in the *Spiliada*. Where on the other hand, leave to issue and serve out of jurisdiction a notice of writ of summons under O. 11 r. 1 of the RHC is involved then according to the reasoning of Lord Templeman, the plaintiff, (not the defendant, be it noted) would have to satisfy a Malaysian Court that, by comparison, that Malaysian Court is the most appropriate forum to try the action. Thus, it will be seen that in the instant case the burden lay on the bank customers, the plaintiffs to satisfy the High Court below that Malaysia was the most appropriate forum.
>
> Having regard to the reasoning of the learned Law Lords in the *Spiliada* and the learned joint article aforesaid, we are of the considered view that in all cases of either a defendant's application for stay of proceedings or a plaintiff's application for leave to serve out of jurisdiction under O. 11 r. 1 of RHC, or for setting aside such leave, it will be obligatory for a Malaysian Court to consider in any event, a most important factor ie, whether "it would be unjust to the plaintiff to confine him to remedies elsewhere". It is indispensable when a Malaysian Court considers all cases in connection with *forum non conveniens*.
>
> The most important factor described above does arise, of course, out of a great variety of factors that a Malaysian Court ought to consider in applying the said doctrine; the prominent one being that whether any particular forum is one with which the action has the most real and substantial connection. One can easily visualize a large number of factors which overlap with one another.

[22] In *American Express* there was an express clause in the agreement that parties chose the Singapore Courts for litigation. This is a point of considerable significance which His Lordship Peh Swee Chin took cognizance of and later held that: (emphasis added)

> We considered the relevant factors in this instant appeal. A very glaring factor in the instant appeal was the foreign jurisdiction clauses in both the said agreements as set out above by which the bank customers had chosen Singapore Courts for the litigation ie., expressly, in other words, the bank customers had submitted

A to the jurisdiction of the chosen Singapore Courts; and further both parties had chosen Singapore law as the law of their choice for the litigation, prospective or otherwise.

It would be clear that, notwithstanding such clauses, a Malaysian Court ie, High Court below, could not be precluded simpliciter thereby from exercising the discretion, according to the doctrine of forum non conveniens, as to whether to hear the instant case or not, please see Federal Court's case of *Globus Shipping & Trading Co (Pte) v. Taiping Textile Bhd.* [1976] 1 LNS 31; [1976] 2 MLJ 154.

[23] From the plain reading of His Lordship Peh Swee Chin's reasoning on the existence of such jurisdictional clause which sets out the manner in which parties would litigate in case of any dispute, we can safely conclude that notwithstanding the presence of such a clause the Malaysian court ie, the High Court below, could not be precluded *simpliciter* thereby from exercising the discretion, according to the doctrine of *forum non conveniens*, as to whether to hear the instant case or not. In *American Express* based on the facts and circumstances it was held that:

... except for the fact that the alleged fraudulent and misleading information or instructions from the foreign bank to the bank customers were received by the bank customers in Kuala Lumpur, all 127 foreign exchange transactions had taken place, outside Malaysia, in London, New York and Singapore and all the securities of the customers were deposited with the foreign bank in Singapore and London. The bank customers who were husband and wife, were residents in Malaysia; but the main protagonists from the foreign bank's camp were residents outside Malaysia, either in London, or Singapore. There were no peculiar difficulties which the bank customers would face apart from the inconvenience and expenses in crossing the causeway to Singapore which was more suitable as a forum. The bank customers, as plaintiffs, had plainly failed to satisfy the Court that the Malaysian Court was the most appropriate forum to try the action which they launched.

[24] It is clear from the above, the Supreme Court in *American Express* was satisfied based on the facts and circumstances which is peculiar to that case that it was much suitable for the case to be adjudicated in Singapore. Reverting back to the case at hand, it therefore behoves us to consider whether Malaysia is the appropriate forum to adjudicate this matter. In our judgment we are satisfied that the High Court and the Court of Appeal being guided by the principles enunciated in the case of *American Express*

had rightfully embarked upon sound reasoning to ascertain which is the natural forum for trying this case. The hard facts of this case would clearly reflect that the performance guarantee was issued in Kuala Lumpur by a Malaysian bank having a place of business in Kuala Lumpur. The guarantee money sought to be restrained by an injunction was at all material times in Malaysia. The demand for the said guarantee money was made in Malaysia. There were various orders made against and in favour of parties as we have elaborated at the earlier part of this judgment by the court having competent jurisdiction within Malaysia. More importantly the first defendant and second defendant's agreement to submit to the jurisdiction of the Sudan courts was non-exclusive. This is clearly provided for in cl. 8 of the performance guarantee wherein it clearly stipulates that "*This performance guarantee shall be governed by and construed according to the laws for the time being in force in Sudan and the SURETY agrees to submit to the non-exclusive jurisdiction of the Sudan Courts*". (emphasis added).

[25] Further to the foregoing, both the High Court and Court of Appeal had deliberated on issues pertaining to logistics, costs of proceedings, political climate and geographical constraints in having this matter litigated in Sudan. We find no reasons to disagree with the High Court and Court of Appeal on this point. More importantly, given that the findings of the High Court and the Court of Appeal was essentially based on questions of facts, we are reluctant to interfere with such findings. Thus, in our judgment, the appropriate forum to litigate this action is Malaysia. Under the circumstances we will answer the question of law posed in the first appeal in the negative.

[26] Questions of Law posed in the 2nd appeal

1st Question

Whether The Balance Of Convenience Test Is Applicable To Performance Bond Injunctions At An Inter Parties Stage Or This Can Be Decided At The Earliest Possible Stage

[27] The question now is, whether it is proper to split the hearing of *interim* injunction application by separating the balance of convenience argument to be argued and heard separately to set aside an *ad interim* injunction. We have considered the submissions urged on us by learned counsel for the first defendant and with respect we are unable to accede to their contentions. It is the standard practice of our courts, that after the grant of the *ad*

interim injunction (pending the *inter partes* hearing) to move on to the hearing of the *inter partes* injunction. Parties will then ventilate all issues and their respective contentions in the *inter partes* hearing of the injunction itself. In this regard we are reminded of the observations made by His Lordship Abdul Hamid bin Mohamed JCA (as he then was) in *RIH Services (M) Sdn Bhd v. Tanjung Tuan Hotel Sdn Bhd* [2002] 3 CLJ 83; [2002] 2 AMR 2457 which we are inclined to adopt in similar vein. His Lordship Abdul Hamid bin Mohamed JCA noted that the *ad interim* injunction to maintain the *status quo* pending the *inter partes* hearing is quite often agreed between the parties. Even if they do not agree the court has the jurisdiction to make such an order. The court has the jurisdiction to grant the *ad interim* injunction even in the event the parties disagree. From the observations made by His Lordship Abdul Hamid Mohamed we can safely conclude that in the interest of smooth and expeditious administration of justice, parties should expeditiously move forward to the hearing of the *inter partes* injunction on the merits. Under the circumstances we find that it is not desirable to split the subject matter of a separate interlocutory application to set aside an *ad interim* injunction concurrently with the opposition to the *inter partes* injunction just on the issue of balance of convenience. As rightfully pointed out by learned counsel for the plaintiffs that to pick up an argument on balance of convenience issue and split it into the subject matter of a separate interlocutory application to set aside the *ad interim* injunction would result in multiplicity of proceedings and is a wastage of time and costs. In our judgment we find that it is more desirable and appropriate that the question of balance of convenience be argued and decided at the *inter partes* stage of hearing of the injunction. Thus, we find that the learned JC did not err in his findings on this point and he had correctly directed his mind to the relevant issues at hand when he held that:

> Following the Supreme Court case of *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* [1995] 1 CLJ 283; [1995] 1 MLJ 149 at p. 158-159, and applying *American Cynamid v. Ethicon* [1975] 2 WLR 316, without the need to ascertain in a kind of detailed analysis the respective strength of the parties herein at this application to set aside the *ad interim* injunction stage, I am satisfied that on the surface at least, that there are serious questions for trial and even though they were not that serious, but nevertheless they could not be described as frivolous or

vexatious. A more mature consideration of this issue of a serious questions to be tried can be further had at the hearing at the *inter parte* stage.

[28] In deliberation on the aforesaid question of law posed to us we are also mindful of the fact that the *ad interim* injunction which formed the subject-matter of the first defendant's application to set aside the *ad interim* injunction was discharged by the High Court on 30 August 2010 at the *inter partes* hearing of the same. Having said that we are inclined to agree with the submissions of learned counsel for the plaintiffs that there is at the moment no live subject matter for us to consider in the first defendant's appeal in the present case, after the first defendant's application to set aside the *ad interim* injunction had been dismissed by the High Court and the appeal therefrom was dismissed by the Court of Appeal. Clearly, for the aforesaid reasons there is no purpose to pursue this issue any further. Accordingly in our judgment the balance of convenience question is academic as the *ad interim* injunction, which formed the subject matter of the first defendant's application to set aside the *ad interim* injunction, was already discharged by the High Court on 30 August 2010 after the High Court heard the *inter parte* application for injunction. For the reasons adumbrated above we will answer the first question of law posed in the second appeal in the negative.

[29] 2nd Question

Whether The High Court, Upon Staying The Suit Subject To An Arbitration Agreement And Parties Having Pursued Arbitration Proceedings, Retains Jurisdiction To Hear The Injunction Application On An Inter Parties Basis

[30] The last question posed in the second appeal needs no in-depth consideration. We are of the view that based on what had transpired in this case, there is no necessity to answer the Second Question. Firstly, the appellant did not appeal against the High Court's decision in respect of the stay granted. Secondly, the facts do not support the first defendant's case. In the present case the High Court order dated 30 June 2010 had granted a stay on part of the High Court suit pending arbitration in respect of the second plaintiff and the first defendant on terms, *inter alia* that the application for the *inter partes* injunction be proceeded with and be heard and disposed of in the High Court. Not all parties were

involved in the arbitration proceedings. This is the reason why the *inter partes* injunction and the other issues between the plaintiffs and the second defendant were expressly excluded for stay. This is clearly reflected in the order of the court dated 30 June 2010 which was drafted and agreed upon by the parties. We must not lose sight of the fact that the first defendant had conformed to the order and later participated in the hearing of the *inter partes* injunction without objecting to the High Court's jurisdiction in proceeding with the *inter partes* application after the stay order was granted. The Court of Appeal did not make a finding as to the stay order as there was no appeal preferred against the same. To dwell upon this question now will be an exercise in futility. Under the circumstances we decline to answer the second question posed in the second appeal as in our considered view it does not have any impact on the outcome of this appeal one way or the other.

[31] In the upshot, we hereby answer the questions posed to us in the first appeal in the negative. We hereby also answer the first question posed to us in the second appeal in the negative. For the reasons given, we find it unnecessary to answer the second question posed in the second appeal. In conclusion the first defendant's appeals being devoid of merits stands dismissed with costs.